87-80

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HELEN CHRISTINE VIDA, Personal Representative of the Estate of Walter John Vida,

Petitioner

v.

PATAPSCO AND BACK RIVERS RAILROAD COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Arnold, Beauchemin & Tingle, P.A.
Richard R. Beauchemin
Gerald F. Gay
16 E. Lombard Street
Third Floor
Baltimore, Maryland 21202
(301) 837-0215
Attorneys for Petitioner

QUESTIONS FOR REVIEW

I. Whether the District Court violated the tenets of this Court's ruling in Tennant v. Peoria and P.U. Ry.Co., 321 U.S. 29 (1944) in failing to properly instruct the jury concerning the law of negligence and contributory negligence under the F.E.L.A.

II. Whether the District Court violated this Court's ruling in Tiller v. Atlantic Coast Line R.Co., 318 U.S. 54 (1944) in refusing to instruct the jury concerning the abolition of the defense of assumption of risk in this action.

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OPINION OF THE COURT BELOW

The unpublished Opinion of the United States Court of Appeals for the Fourth Circuit and its unpublished Order denying Petitioner's request for rehearing with suggestion for rehearing en banc are set forth verbatim in the appendix at pages 1a - 29a.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Helen Christine Vida, by Arnold, Beauchemin & Tingle, P.A., Richard R. Beauchemin and Gerald F. Gay, respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in the instant case, Helen Christine Vida, etc. v. Patapsco and Back Rivers Railroad Company, No. 86-1559 (C.A. 4, March 17,

1987), petition for rehearing denied (C.A. 4, April 17, 1987).

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1254(1).

Statutes

45 U.S.C., Sec. 51

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence;
>
> definition of employees
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages

to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employees of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such

commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

45 U.S.C., Sec. 54. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case

where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

STATEMENT OF THE CASE

Petition's decedent, Walter John Vida, an employee of the Patapsco and Back Rivers Railroad, Respondent, was found dead on the railroad's premises on April 22, 1983. Vida's body was discovered by fellow employees laying face down across a portion of the Respondent's trackage in a pitch dark area of the Respondent's yard. The upper torso was completely severed from the lower portion of his body by the wheels of a backing drag of railroad

cars.

This case presents an appeal from two judgments entered below in the United States District Court for the District of Maryland. On August 1, 1983, Appellant, Helen C. Vida, individually (as surviving spouse) and as Personal Representative of the Estate of Walter John Vida, filed suit under the Federal Employer's Liability Act, 45 U.S.C. Sec. 51 et seq. (F.E.L.A.) against the Appellee, Patapsco and Back Rivers Railroad Company, seeking compensatory damages for loss of services and economic loss suffered by her as a result of the death of her husband.

The matter was first tried on July 23 through 25, 1984, before the

Honorable Joseph Young, United States District Judge and a jury. On July 25, 1984, the jury returned a verdict in favor of the Plaintiff for $275,000.00; the jury further found the decedent to have been 15 percent contributorily negligent. Accordingly, on August 2, 1984, judgment was entered in favor of the Plaintiff and against the Defendant railroad in the sum of $233,750.00.

On August 2, 1984, the Defendant filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, to which the Plaintiff filed timely answers.

On October 23, 1984, following a Hearing before the District Court on September 7, 1984, an order granting

Defendant's Motion for New Trial was entered.

The case was tried a second time on December 11 through December 17, 1985, before the Honorable J. Frederick Motz, United States District Judge, and a jury. On December 17, 1985, the jury returned a verdict upon special interrogatories in favor of the Defendant. Judgment was entered upon that verdict on December 30, 1985. Plaintiff's Motion for New Trial was denied without a hearing by entry of an order on February 11, 1986.

On March 6, 1986, Plaintiff filed a timely Order for Appeal from the above judgments and orders respecting the Motions for New Trial filed below. The issues were briefed and oral

argument held on November 13, 1986 before a three judge panel in the United States Court of Appeals for the Fourth Circuit.

An unpublished opinion was issued on March 17, 1987 in which the Court of Appeals affirmed the judgments rendered below by the United States District Court for the District of Maryland. The Petitioner's Petition for Rehearing was denied by Order of the Court of Appeals on April 17, 1987.

As a result of these actions of the Courts below, your Petitioner, Helen Christine Vida now files this Petition for Writ of Certiorari.

ARGUMENT

The United States District Court for the District of Maryland, in

the second trial herein, clearly violated the tenets laid down by this Court in Tennant v. Peoria and P.U. Ry.Co., 321 U.S. 29 (1944) and Tiller v. Atlantic Coast Line R.Co., 318 U.S. 54 (1943), and the affirmance by the United States Court of Appeals for the Fourth Circuit has so far sanctioned this violation of the tenets of this Court so as to necessitate the exercise of this Court's supervisory power so as to ensure uniformity of decisions under the Federal Employers' Liability Act.

I. THE DISTRICT COURT IMPROPERLY STRIPPED THE PETITIONERS' DECEDENT OF THE PRESUMPTION OF DUE CARE TO WHICH HE WAS ENTITLED BY FAILING TO PROPERLY INSTRUCT THE JURY IN ACCORDANCE WITH THIS COURT'S DECISION IN TENNANT V.

PEORIA AND P.U. RY.CO., 321 U.S. 29 (1944).

This F.E.L.A. claim arose out of an unwitnessed fatal accident which occurred on April 22, 1983. On that date, at approximately 10:35p.m., Walter John Vida, (deceased), a 61 year old brakeman employed by the Respondent was killed when he was run over by a drag of railroad cars in the course of his employment while working on the railroad's premises in Sparrow's Point, Maryland. Vida's body was completely severed just below the shoulders, apparently causing instantaneous death. A length of metal wire which was later identified as having originated from the Defendant's premises was found wrapped around the decedent's leg.

In the second trial of this matter, the Petitioner presented the following affirmative evidence concerning the negligence of the Respondent railroad: 1. Vida was required to work and give signals in a pitch dark area of the railroad's yard; that the railroad could have illuminated this area and, thus, made it safer was illustrated by the fact that floodlights had been installed on a scalehouse further up the track from the point where Vida was killed. 2. The fireman operating the locomotive pushing the drag of cars admitted that immediately after seeing Vida's lantern signal, he moved the drag backwards, even though he had no idea where Vida was located and never saw his lantern light again; the

railroad police officer who investigated the case testified that he found Vida's body laying across the Defendant's railroad tracks at a point near where the engineer last observed Vida's signal; both of Vida's arms were outside of the north rail of the track outstretched in front of his head, his feet nearly touching the south rail; a length of metal wire was found wrapped around his leg, even though his body had been rolled several times by the passing train. 3. The engineer, Mannion, testified that he ran the engine over the spot where Vida was found at least four times and never gave Vida any warning prior to shoving the drag of cars backward, even though without radio communication, there was no way for Vida

to know his signal had been received and was about to be acted upon. There was no direct evidence contradicting the evidence on these points.

This fatal accident, by the uncontradicted evidence presented at trial, was an unwitnessed occurrence. Therefore, under this Court's decision in Tennant v. Peoria and P.U. Ry.Co., 321 U.S. 29 (1944), there is a legal presumption that Vida was actually engaged in the performance of his duties and was exercising due care for his own safety at the time of his death. Id. at 34. Indeed, the instant case bears a remarkable factual simularity to Tennant, in which a switchman was killed in an unwitnessed accident which occurred when he was decapitated by a

backward moving train. At trial, the engineer admitted that he did not ring the engine's warning bell, nor did he ascertain the decedent's whereabouts prior to moving the cars. 321 U.S. at 33. There, this Court reversed the Circuit Court of Appeals' erroneous setting aside of the District Court jury verdict holding that on those facts, the Plaintiff had made out a proper case of liability against the railroad.

In his instructions to the jury, the District Judge, in the second trial of this case, refused to remove contributory negligence as an issue, even though there was no direct, affirmative evidence of any negligence on Vida's part to rebut the presumption of due care. Further compounding this

error, the court charged the jury as follows:

> "You are instructed as a matter of law that there's a presumption that Mr. Vida was actually engaged in the performance of his duties and was exercising due care for his own safety at the time the accident occurred which caused his death. Of course, this presumption can be rebutted by the evidence that has been presented in this case to the contrary."

In so instructing the jury, the District Judge completely obliterated the presumption of due care to which the Petitioner's decedent was entitled by virtue of this Court's holding in Tennant, supra. In the instant case as in Tennant, defense counsel suggested possible factual scenarios to support the giving of such

an instruction. However, as stated by this Court in Tennant:

> ". . . other possibilities suggested by diligent counsel for the (railroad) all suffer from the same lack of direct proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no presumption in their favor exists. Nor can any possible assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to (railroad's) negligence."

321 U.S. at 34-35.

By implying to the jury that evidence sufficient to rebut the Tennant presumption had been "presented in this case to the contrary," the District Court obviously confused the jury.

That the jury was confused by the trial judge's instructions concerning negligence and contributory negligence is unequivocally demonstrated by the fact that the jury returned to the courtroom requesting to be reinstructed on these issues, after deliberating some three and a half hours.

The verdict returned by the jury upon special interrogatories also demonstrates the confusion generated by the trial judge's improper instructions. In its verdict, the jury found that the railroad was negligent; however, the jury also found that the railroad's negligence did not contribute even in the slightest to Vida's death (App. 31a & 32a).

On its face, the jury's

verdict is an absurd result. If one assumes that the jury found the railroad to be negligent in failing to provide the decedent a reasonably safe place in which to work, under any of the Plaintiff's theories, i.e. improper lighting, short crew, the presence of the wire in an unlit work area, the movement of the train by Mannion when he did not know Vida's whereabouts - it is obvious by the very nature of these allegations that these facts must have played some part in bringing about Vida's death, thus entitling Appellant to recover under the F.E.L.A. Rogers v. Missouri Pac. R.Co., 352 U.S. 500 (1957).

For example, it would be ridiculous for the jury to find that the

railroad was negligent in failing to remove the wire from the unlit work area near track 388, yet find the presence of the wire (found wrapped around Vida's leg), played no part in Vida's death.

Similarly, with regard to the short crew theory, it would be ludicrous for the jury to find that the lack of a relay signalman caused Vida to stand closer to the drag so the engineer could see his backup signal, yet find that his proximity to the drag which literally ran over him, played no part in his death; or perhaps most absurdly to find that Mannion's backward movement of the drag without first visually locating Vida played no part in the accident.

From a review of the record, it is clear that the bizarre jury

verdict rendered in this case was a direct result of the trial judge's failure to instruct the jury on the issues of negligence and contributory negligence in a manner consistent with this Court's holding in Tennant v. Peoria and P.U. Ry.Co., supra.

II. THE DISTRICT COURT VIOLATED THIS COURT'S RULING IN TILLER V. ATLANTIC COAST LINE R.CO., 318 U.S. 54 (1944) IN REFUSING TO INSTRUCT THE JURY CONCERNING THE ABOLITION OF THE DEFENSE OF ASSUMPTION OF RISK IN THIS ACTION.

The District Court committed further error in refusing to grant Petitioner's requested jury instruction number 10, which would have instructed the jury that the decedent did not

assume the risks of harm incident to his employment. Certainly, there is no doubt as to the correctness of this legal proposition. 45 U.S.C., Section 54.

In Tiller v. Atlantic Coast Line R.Co., 318 U.S. 54 (1943), this Court, in interpreting the 1939 amendment to the statute abolishing assumption of risk as a defense in F.E.L.A. actions held that:

> "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendments, and . . . Congress did not mean to leave the identical defense for the master by changing its name to "non-negligence." . . . Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk by another name."

However, the trial judge refused to charge the jury as requested, stating that an instruction on assumption of risk would "mislead more than it would help."

Counsel for the Respondent, in closing argument, specifically raised the issue of assumption of risk by stating:

> There's no question that railroading is hazardous work. The men know that, its part of the duty, (emphasis supplied).

Obviously, defense counsel intended to imply to the jury that the presence of the wire that tripped the decedent, the inadequate lighting and improper backward movement of the train which killed the decedent were risks which he assumed.

There is no guidance from this

Court as to when the granting of an instruction on assumption of risk is appropriate. The Petitioner would respectfully submit that if the intent of Congress in amending the F.E.L.A. to eliminate assumption of risk as a defense is to be effectuated, that such an instruction should be given in every case, so that the injured employee's rights will not be sacrificed "by simply charging him with assumption of risk by another name." 318 U.S. at 58.

However, even under the case law as applied by the federal circuit courts of appeal, defense counsel's argument clearly implying that the decedent assumed the risks of his employment as "part of the duty" entitled the Petitioner to an

instruction on the non-applicability of the assumption of risk defense. Casko v. Elgin, Joliet, and Eastern Ry.Co., 361 F.2d 748, 751 (7th Cir. 1966), Koshorek v. Penn Ry.Co., 318 F.2d 364 (3d Cir. 1963).

The Court of Appeals for the Fourth Circuit in its opinion in this case, indicated that such an instruction was not required. The three judge panel opined that "while it is true that assumption of risk is not a proper defense in an FELA action, it does not follow that the District Court must give such an instruction if requested." (App. 4a). Further, the panel stated "nor. . . will the fact that counsel for the railroad merely referred to the 'hazardous' nature of railroading make

the instruction necessary." (App. 4a). The panel completely overlooked the fact that defense counsel argued not only that railroading was "hazardous," but also stated to the jury that the hazards were "part of the duty" which the decedent undertook as part of his railroad employment.

This failure of both the District Court and Court of Appeals to properly instruct the jury was extremely prejudicial to the Petitioner. The jury's verdict in the second trial of this case, finding the Respondent negligent, but that the Defendants negligence did not play any part in Vida's death was obviously the result of confusion caused by the Court's instructions. Apparently, the jury was

mislead by defense counsel's improper argument and the Court's failure to grant a curative instruction, into believing that Vida assumed the risks of harm created by the negligence of the railroad. Clearly, under this court's holding in Tiller, such an application of the law is improper and contrary to established precedent under the F.E.L.A.

CONCLUSION

For the aforegoing reasons, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision and that of the U.S. District Court for the District of Maryland be reversed.

Respectfully submitted,

Arnold, Beauchemin & Tingle, P.A.
Richard R. Beauchemin
Gerald F. Gay
16 E. Lombard Street
Third Floor
Baltimore, Maryland 21202
(301) 837-0215
Attorneys for Petitioner

I HEREBY CERTIFY that on this 8th day of July, 1987, three copies of the aforegoing Petition for Certiorari and Appendix were hand-delivered to Rudolph Lee Rose, Esquire, and Semmes, Bowen & Semmes, 250 W. Pratt Street, Baltimore, Maryland 21201.

Richard R. Beauchemin

APPENDIX

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IN THE

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HELEN CHRISTINE VIDA, Personal Representative of the Estate of Walter John Vida,
Petitioner

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Richard R. Beauchemin
Gerald F. Gay
16 E. Lombard Street
Third Floor
Baltimore, Maryland 21202
(301) 837-0215
Attorneys for Petitioner

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UNPUBLISHED

OPINION OF THE COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1559

HELEN CHRISTINE VIDA, Personal Representative of the Estate of Walter John Vida, deceased,
Appellant,

versus

PATAPSCO & BACK RIVERS RAILROAD COMPANY, a body corporate,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-83-2803)

Argued: November 13, 1986.
Decided: March 17, 1987

Before RUSSELL and HALL, Circuit Judges,

and McMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

Richard R. Beauchemin (Gerald F. Gay; Arnold, Beauchemin & Tingle, P.A. on brief) for Appellant; Rudolph Lee Rose (Robert T. Franklin; Semmes, Bowen & Semmes on brief) for Appellee.

RUSSELL, Circuit Judge:

This wrongful death FELA action has been twice tried. The first trial resulted in a verdict in favor of the Plaintiff, who is the personal representative of the deceased. After such verdict the district judge granted the motion of the defendant Railroad for a new trial. At the second trial the verdict of the jury was for the defendant. It is from the judgment entered on this second verdict that this appeal by the plaintiff is taken.

Among the grounds for appeal are two objections to the jury instructions on the second trial.1 One of these objections is directed at the submission by the district judge of the issue of the deceased's contributory negligence. We are satisfied from a review of the record that the district judge did not err in submitting such issue to the jury. In its second claim of error the plaintiff complains of the failure of the district judge to instruct the jury that the deceased did

1 The Plaintiff also complains of the denial of his motion for a new trial after the second verdict. The basis for such motion is that the verdict was against the weight of the testimony. As we point out later, the district court's ruling in this regard may only be reversed for clear showing of abuse of discretion. The plaintiff has made no such showing and the motion was properly denied.

not assume the risks of his employment. While it is true that assumption of risk is not a proper defense in an FELA action, it does not follow that the district court must give such an instruction if requested. In fact, most of the cases in which the question has arisen have found such an instruction confusing and for this reason the district judge's determination not to give the instruction will not to be disturbed on appeal. See Clark v. Pennsylvania R.R.Co., 328 F.2d 591, 5 (2d Cir. 1964). Nor, as the district judge stated, will the fact that counsel for the Railroad merely referred in his closing argument to the "hazardous" nature of railroading make the instruction necessary. The plaintiff's

primary claim of error, and the only one requiring any elaboration, is the granting by the district judge of a new trial after the first trial. For the reasons hereafter stated, we find no reversible error in the granting of a new trial after the first trial and we therefore affirm the judgment below.

To understand the challenge to the district court's grant of a new trial, we must outline the facts which resulted in the death of the intestate. The deceased was employed as a brakeman by the defendant Railroad and at the time of his death on April 11, 1982 he was working on the night shift (3p.m. to 11p.m.) of a crew consisting of himself and an engineer named Manion engaged in switching operations in the yards of the

Sparrow Point plant of Bethlehem Steel Corp. As he and Manion were concluding their shift and making their last "cut-out", the deceased, standing at a point between the moving track and a short spur track, gave Manion a clear back-up signal with his lantern. Manion proceeded to back the train pursuant to the deceased's signal at a "walking speed" until he reached the place where he was to cut off his final switch. Manion did not see the deceased after the latter gave him the back-up signal. A short time later the body of the deceased was found in the middle of the track where he had been when he signalled Manion. There were no witnesses to the accident resulting in the death.

The plaintiff is the deceased's widow and the personal representative of his estate. As such she has filed this action alleging that the deceased's death was caused by the Railroad's negligence. In response to an Interrogatory addressed to her by the Railroad, the plaintiff identified the specific acts of negligence on which she relied for her right of recovery as

> that the premises where he was required to work were unsafe, due to the lack of lighting, that the crew members working with the decedent were not attentive to nor did they know where he was located at the time of the movements made by the crew at the point where the accident occurred; that the Defendant's crew did not see any more signals from the decedent but yet continued to operate the train and caused the injuries to the decedent resulting in his death; that

> the Defendant and its employees failed to properly supervise the movements being made at the time of the occurrence.

In the Pre-Trial Order, agreed to by the parties on July 10, and submitted to them to the district court on the date of trial on July 23, 1985, the plaintiff set forth the facts on which she expected to rely and prove as the grounds for her charge of negligence on the part of the Railroad. She said:

> The Plaintiff contends that the Defendant was negligent in causing the injuries which resulted in the decedent's death by failing to furnish the Plaintiff's decedent with a reasonably safe place in which to work in that the area where the decedent was required to work was dark and three of the crew members were not in their positions on the train crew at the time of the accident causing the decedent's death. The Plaintiff contends that the

conductor of said crew was not on the scene and was not in charge of the train as his duties require, that the engineer of said crew had left the property completely and had he been seated on the fireman's seat at the time of the occurrence, the decedent would not have placed himself in any jeopardy insofar as the accident was concerned. The Plaintiff further contends that the employee fireman who was operating the engine continued to move said movement after the light of the decedent disappeared. That when the decedent was found missing, the engine was operated several times over the area where the decedent was killed. That the Defendant failed to provide adequate lighting at the scene of the accident; that the movement was made without a signal from the decedent and without knowing the location of the decedent at the time of said movement and that the Defendant and its employees failed to properly supervise a movement being made at the time of the occurrence.

As the trial began, the

Railroad raised objections to a proposed exhibit of the plaintiff. This exhibit was the report of a police investigation conducted shortly after the accident resulting in the death of the deceased. The Railroad's objection was two-fold. First, it said the report could only be admitted on the basis of the investigating officer's report. However, that officer had not been listed as a witness in the plaintiff's response to an Interrogatory requesting such information. Beyond that, it perceived the purpose of the introduction of the report to be the admission in the record of a new theory of liability, predicated on the claim that the defendant had violated its duty to provide the deceased a safe place to

work by permitting a piece of wire to be in the darkened area where the deceased was working at the time of his death and that it was this piece of wire, referred to in the police investigation, on which it was to be argued that the deceased tripped and fell. The Railroad urged that this would have brought into the case a new ground of recovery not identified in either plaintiff's response to the Railroad's Interrogatory or in the Pre-Trial Order agreed upon by the parties. It posited that, to permit the police officer to testify, and to introduce the new theory of negligence on eve of trial would be unfair and prejudicial, since it had not earlier sought in discovery to inquire into this new theory or to depose the police

officer.

The plaintiff's response to this argument of the Railroad was that she had only become aware of the report of the police investigation on June 28, about a month before trial, as a result of the production by the defendant of a report of such investigation. On the other hand, the Railroad contends it was unprepared to contest this new claim of negligence first advanced at the commencement of trial. It complained of not having any opportunity to investigate the claim, to depose the witness who made the investigation, and to pursue other relevant facts. It argued--though the relevance of this argument may be doubtful--that at the second trial it was able to present

other evidence on this claim, based on an investigation conducted after the first trial, that refuted the plausibility of this claim--evidence which apparently satisfied the second jury. Whether this is a fair inference may be debated. But in any event, the district judge who presided at the first trial concluded from his observations during the trial that the matter of prejudice to the Railroad by reason of the introduction into the trial of this new theory based as it was on new evidence was sufficiently plausible that he felt that justice required the granting of a new trial. After some discussion, the district judge delayed any ruling on the conflicting positions until the exhibit was offered in

evidence and the police officer was presented as a witness. However, when that point was reached later in the trial, the district judge sustained the use of the police officer as a witness for the plaintiff and in effect allowed the plaintiff to rely on this evidence and the report of the investigation to support a new act of negligence not heretofore advanced in the trial.

After submission of the cause to the jury, a verdict for the plaintiff was returned. On motion for judgment n.o.v. or for a new trial by the Railroad, the district court denied judgment n.o.v.[2] but granted the motion

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2 The district court did comment, in denying their motion, that the evidence of negligence in this case was as "thin a case" under the FELA as he had seen.

for a new trial. The district court based its grant of a new trial on three grounds of concern: 1) The absence of any real inquiry into the working arrangement of the employees on the shift on which the deceased was engaged at the time of his death; 2) The admission into evidence of the presence of a "piece of wire" at the scene of the accident and the introduction of a new theory of negligence at trial not identified either in the plaintiff's responses to the Interrogatory or in her agreed statement of issues in the Pre-Trial Order; and 3) His concern over the proof of damages. It is this order which is the real issue on the appeal.

A motion for a new trial is addressed to the sound discretion of the

district judge. Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1433 (4th Cir. 1985), cert. denied, 106 S.Ct. 1199 (1986). The exercise of such discretion is not as constrained as the power to grant a directed verdict. As we said in Garrison v. United States, 62 F.2d 41, 42 (4th Cir. 1932), quoted with approval in Ellis v. International Playtex, Inc., 745 F.2d 293, 298 (4th Cir. 1984), "[w]here there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side. . ." However, the judge may on a motion for a new trial engage in a "comparison of opposing proofs" and may "weigh the

evidence and assess credibility," Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-92 (4th Cir. 1980), and "set aside a verdict supported by substantial evidence if it is contrary to the clear weight of the evidence, or is based upon evidence which is false, 'or is' necessary to prevent a miscarriage of justice," Ellis v. International Playtex, supra. Thus, the trial judge may grant a new trial because the amount of the verdict is not reasonably supported by the verdict, Occidental Life Ins. Co. v. Pat Ryan & Associates, 496 F.2d 1255, 1264 (4th Cir. cert. denied, 419 U.S. 1023 (1974); Virginia Ry.Co. v. Armentrout, 166 F.2d 400, 407 (4th Cir. 1948), and particularly if the amount of the

verdict may not be fairly justified by the record, Klein v. Sears Roebuck & Co., 773 F.2d 1421, 1428 (4th Cir. 1985).

In our opinion the plaintiff has failed to make such "clear showing" of abuse of discretion by the trial judge in granting a new trial. One of the grounds on which the trial judge based his decision was his "concern [ ] at the amount of damages in view of the proof offered at the time of trial." The plaintiff's proof of damages relied entirely on the computation of loss made by an expert witness. This computation is seriously flawed, as the trial judge seems to have perceived. Thus, in computing the deceased's lost wages, the witness

assumed that those wages would increase at the rate of 9 per cent for each year of what the witness found to be the deceased work expectancy. The witness fixed the deceased's work expectancy based on retirement at age 70. Since the deceased was 62 years of age at this death, his work expectancy would have ben 8 years, during all of which, under the witness' calculations, the deceased's wages would have increased at 9 per cent each year. This method of calculation would mean a compounding each year of the 9 per cent assumed wage increase. In reaching this conclusion, the witness made no inquiry into the record of increases the deceased had received; this was especially important in assessing the validity of the

witness' calculations, because it was conceded at trial that the deceased's employment was under a collective bargaining agreement which froze his wages for four years. In short, in four of the eight years the witness assumed the deceased would have been working and receiving annually a 9 per cent wage increase, even though the deceased would actually have received none.

Nor is this the only flaw in witness' calculations of lost wages. He assumed, as we have seen, that the deceased would have continued working until he was 70, even though the witness admitted that normally an employee would be assumed to retire at 65. Actually in the railroad industry, as demonstrated by the statistics of the American

Association of Railroads, the normal age for retirement of working crews was 62. The expert basically explained that he assume retirement by the deceased at 70 simply because counsel for the plaintiff instructed the expert to use 70 as the assumed retirement date for the deceased. The effect of this was to inflate by almost eight years the deceased's work expectancy. There are other flaws not so apparent as these in the expert's assumption. Yet the expert's testimony was the only evidence adduced on the lost wages of the deceased. It is understandable that the district judge should have been uncomfortable with the proof of loss in this case.

There were other matters on

damages that the defendant contends were improperly injected into the case. The district court instructed the jury on lost services suffered by the widow as a consequence of the death of her husband. There was no evidence whatsoever of any lost services. Moreover, the plaintiff introduced evidence that could only have been intended to suggest pain and suffering and to induce sympathy. The deceased, according to all the record, died instantaneously and suffered no pain and suffering. These questions no doubt weighed in the district court's consideration of the motion for a new trial.

The district judge was also troubled, as he declared in his order, by the possibility of prejudice to the

defendant resulting from the introduction at trial of a new ground of liability and the use of a critical witness whose name had not been noticed as required under the district court's discovery order. The importance of this new ground of liability was recognized by the plaintiff's counsel in his opening statement to the jury. In this statement, he declared "first of all that the immediate precipitating cause of this accident was that Mr. Vida [the deceased] was caused to trip and fall across tracks by a wire that had been left laying around there that got wrapped around his legs causing him to trip and fall." This, the parties concede, was a ground of liability not identified in the Pre-Trial Order in

which the parties set forth their positions. It is said that this Order was prepared before the plaintiff knew of the report of the police investigation of the accident. The Order was agreed on by July 10 before the Order was presented to and approved by the district judge on July 23, the day the trial was to begin. The plaintiff, by her counsel, conceded knowledge of the police investigation on which this claim was based on June 28. This was before the parties had agreed on the Pre-Trial Order and almost a month before the Order was signed by the district judge. The plaintiff argues, however, that, even though it might be that she was tardy in calling the matter to the attention of the defendant and

court and of requesting an amendment of the Pre-Trial Order, the fact of the matter was that the evidence on which the plaintiff relied for this claim was in the files of the defendant. Under those circumstances, the plaintiff urges that the defendant was not prejudiced by the admission of this evidence. We are unable to assess with the same confidence as the district judge these conflicting views. The district judge, from his vantage point, had a far better opportunity to weigh the arguments of the parties at this point than we who have only a cold record to rely on. We are not disposed to dismiss as unfounded the concerns expressed by him that the defendant may have been unfairly prejudiced in this regard.

We have reviewed with some care these two grounds on which the district judge granted a new trial. The district judge stated another ground for his decision, the support for which may not be as clear as the two grounds we have covered. Taking all the grounds together, though, it is plain that the district judge's order requesting a new trial did not constitute a clear abuse of discretion.

Finally, the plaintiff complains that the judge did not spell out in detail his grounds and that for this ground the granting of a new trial should be reversed. We confronted a similar argument in Ellis v. International Playtex, supra, at 298 and dismissed it with this comment: "A

fuller discussion might have been preferable, but brevity is not grounds for reversible error." This same comment is appropriate here. As we have said, the district judge's grounds find support in the record and, recognizing the limited nature of our review, we find no abuse of discretion on the part of the district judge and, therefore, affirm the judgment herein.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-1559

Helen Christine Vida, etc.,
Appellant,

versus

Patapsco & Back Rivers Railroad Company, etc.,
Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Hall and Judge McMillan, United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN
CLERK

REQUESTED INSTRUCTION NO. 10
ON BEHALF OF THE PLAINTIFF

Section 4 of the Federal Employers' Liability Act (45 U.S.C.A. Section 54) provides in part that:

> "In any action brought against any common carrier. . . to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

If the death was caused or contributed to by the negligent act or omission of a fellow employee, acting in the course of his employment, then the Defendant employer would be responsible for the act or omission of said fellow employee.

Devitt and Blackmar, Federal Jury Practice and Instructions, Section 94.11

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HELEN C. VIDA	*	
	*	
v.	*	CIVIL NO.
	*	
PATAPSCO AND BACK RIVERS RAILROAD COMPANY	*	JFM-83-2802
	*	
	*	

ISSUES

1. Was Patapsco and Back Rivers Railroad Company negligent in one or more of the particulars alleged?

YES YES NO_____

If the answer is "Yes" go to question 2.

If the answer is "No" your deliberations have been completed and you should notify the bailiff.

2. Did the negligence of Patapsco and Back Rivers Railroad Company cause or contribute to the death of Walter Vida?

YES_____ NO NO

If the answer is "Yes" go to question 3.

If the answer is "No" your deliberations have been completed and you should notify the bailiff.

3. Was Walter Vida guilty of negligence which caused or contributed to the accident?

YES_____ NO_____

If the answer is "NO" go to question 4.

If the answer is "Yes" then you must indicate the percentage of negligence of Walter Vida and go to question 4.

_____%

4. Disregarding your answer to question 3, in what amount do you assess damages?

$_____

12-17/85 TIME
Date and Time

Earl F. Kidwell
Foreperson